IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 20, 2008

STATE OF TENNESSEE v. SHERRIE ANN COLLINS

Appeal from the Circuit Court for Dickson County
No. CR8784 Robert E. Burch, Judge

No. M2007-01356-CCA-R3-CD - Filed June 27, 2008

The Appellant, Sherrie Ann Collins, after being granted judicial diversion, appeals, as of right, the judgment of the Dickson County Circuit Court ordering her to pay restitution of $62,000 as a condition of her probation. The plea agreement provided that Collins would enter a "no contest conditional plea under 40-35-313 [judicial diversion]" and would receive a sentence of "three years suspended to probation." The agreement further provided that the amount of restitution would be determined by the trial court. Following a hearing, the court found the victim's pecuniary loss was $62,000; however, based upon Collins' financial status and lack of ability to repay, she was ordered to pay $100 per month for the 36-month duration of the probationary period. Rather than being deferred, as required by the judicial diversion statute, a judgment of conviction was entered reflecting Collins' conviction for Class C felony theft and a three-year Department of Correction sentence, which was noted as being suspended. Contrary to the restitution order previously entered, ordering restitution of $3,600, the judgment form ordered restitution of $62,000. Collins appeals the restitution award of $62,000 as recited in the judgment form. The State agrees that Collins was ordered to pay restitution of $3,600, not $62,000. Notwithstanding, the fact that a "non-issue" is presented, we are also confronted with the jurisdictional issue that no appeal of right, as provided by Rule 3, Tennessee Rules of Appellate Procedure, exists because Collins was granted judicial diversion, and, thus, no judgment of conviction has, or should have been, entered. Accordingly, the appeal is dismissed.

Tenn. R. App. P. 3; Appeal Dismissed

DAVID G. HAYES, SR. J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and NORMA MCGEE OGLE, JJ., joined.

William B. "Jake" Lockert, III, District Public Defender; and Christopher L. Young, Assistant District Public Defender, Ashland City, Tennessee, for the Appellant, Sherrie Ann Collins.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Dan M. Alsobrooks, District Attorney General; and Carey Thompson, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background & Procedural History

On October 24, 2006, a Dickson County grand jury returned a presentment charging the Appellant with theft of property over the value of ten thousand dollars ($10,000) but less than sixty thousand dollars ($60,000), a Class C felony. The presentment specifically alleged that approximately $30,000 had been stolen by the Appellant. During the time period in which the offense was alleged to have occurred, the Appellant worked as a salesperson at a pawn shop located in Dickson County.

On April 4, 2007, the Appellant entered a "no contest conditional [guilty] plea" to the charged offense, pursuant to Tennessee Code Annotated section 40-35-313, the judicial diversion statute. The plea agreement[1] provided that the Appellant would receive a "three year suspended to probation" sentence conditioned upon payment of restitution, which would be determined by the trial court. At the restitution hearing, the proof established that the Appellant, by falsifying pawn documentation and/or by physical theft, stole $10,506 in merchandise and $51,494 in cash from the pawn shop business.

The proof also established that the Appellant was twenty-four years old and unmarried, and that she has a six-year-old child for whom she is the sole provider of support. The Appellant testified that, at the time of the hearing, she had no income, because she was due to give birth to another child in fifteen days. She testified that she receives an "AFDC" check in the amount of $142 per month, and a food stamp allotment of $284 per month. The Appellant related that her salary at the pawn shop was nine dollars per hour, plus a one-percent monthly sales commission, and that this had been the "best paying" job she had ever had. She further indicated that she did not graduate from high school, having only completed the tenth grade, and that she did not receive a GED.

On April 12, 2007, the trial court issued a memorandum opinion containing its findings of fact and conclusions of law. The trial court found that the pecuniary loss of the pawn shop, through the Appellant's theft of cash and merchandise, was $62,000.[2] The court further found:

---

[1] This court has held that the Sentencing Act does not contemplate the trial court's acceptance of a negotiated plea agreement concurrently with a grant of judicial diversion. *State v. Judkins*, 185 S.W.3d 422, 425 (Tenn. Crim. App. 2005). The reason is obvious; in the event the diversion program is successful, the agreement is for naught. In the event diversion is unsuccessful, *i.e.*, a condition of probation is violated, it is unlikely that the trial court will simply sentence the violated probationer to another sentence of probation. As such, the entry of the plea agreement represents an exercise in futility, as it accomplished nothing. *Id.*

[2] It is emphasized that the amount of the restitution ordered to be paid need not equal the victim's precise pecuniary loss. T.C.A. § 40-35-304(b),(d); *State v. Smith*, 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994). The trial court's determination of the restitution amount requires consideration of the defendant's financial resources and future ability to pay or perform. T.C.A. § 40-35-304(d).

> . . . payment of the entire restitution amount within the probation period is an impossible requirement. The Court finds that the [Appellant] would only be able to pay the sum of one hundred ($100) dollars per month on both restitution and court costs. The probation fees would obviously have to be waived. If [the Appellant]'s situation changes for the better, the State could petition the Court to increase the payments she is required to make toward restitution . . . .

The judgment of conviction which was erroneously entered on April 9, 2007, however, reflects that the Appellant was sentenced to three years of probation.[3] The judgment form further provides that the Appellant was ordered to pay a total amount of $62,000 in restitution to the victim in this case, "Pawn Shop[,] C/O Billy Moran[,] 2191 Hwy 48 N[,] Charlotte, TN 37055."

Analysis

The Appellant alleges error with the trial court's order of restitution as reflected by the judgment of conviction. She argues that "since the [trial court] ruled the Appellant was only able to pay one hundred dollars . . . per month in restitution for a period of [36] months[,] that the total amount of restitution that could be ordered by the [trial court] in this criminal proceeding is [$3,600] . . . ." The State agrees that the ordered amount of restitution is $3,600.

Although not raised as error by the State, we are compelled to note that the Appellant's issue of restitution is not properly before this court. An appeal, as of right, exists only from a final judgment. *See* Advisory Comm'n Comments, Tenn. R. App. P. 3. As established by the holding in *State v. Norris*, 47 S.W.3d 457, 461-63 (Tenn. Crim. App. 2000), when a defendant is granted judicial diversion, no adjudication of guilt is made and no judgment of conviction is entered, thus, a Rule 3 appeal as of right is not permissible. While the choice to accept judicial diversion may jeopardize a defendant's opportunity to raise a legal issue, the *quid pro quo* is that the defendant who accepts diversion can emerge from the process without a conviction. *Id*.

In *Norris*, this court acknowledged that the situation may arise in which a defendant granted judicial diversion may seek to appeal a condition, or the reasonableness of a condition of probation which may be accomplished by the means of a Rule 9 or Rule 10 discretionary, interlocutory appeal. 47 S.W.3d at 463. Indeed, this is the situation in the present case. Under the circumstances

[3] The diversion statute, Tennessee Code Annotated section 40-35-313(a)(1)(A), provides: "The court may defer further proceedings against a qualified defendant and place such defendant on probation upon such reasonable conditions as it may require without entering a judgment of guilty and with the consent of the qualified defendant." (emphasis added). Moreover, we would note that it is not established by the record that the Appellant is qualified, in the absence of the required TBI certificate. *See* T.C.A. § 40-35-313(a)(1)(B)(i),(a)(3)(A).

presented, the Appellant could have pursued a Rule 9 interlocutory appeal with permission of the trial court, which she did not do.[4]

Although we are without jurisdiction to extend review of the issue presented upon its merits, the remedy here is simply for the trial court to withdraw entry of the judgment of conviction which should not have been entered in the first place. This leaves in place the trial court's "Memorandum Opinion" finding restitution in the amount of $3,600, which is not disputed by either the State or the Appellant.

CONCLUSION

Based upon the foregoing reasons, the appeal is dismissed.

_____

DAVID G. HAYES, SENIOR JUDGE

[4]The issue raised does not present a compelling case for the granting of a Rule 10 extraordinary appeal, "that the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review."